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NO. 83-1689

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

KAY J. BROWN, Administratrix of the Estate of Edward Carol Brown, deceased,

Petitioner

v.

PATRICIA ANN BROWN, et al.,

Respondents

BRIEF IN OPPOSITION OF RESPONDENT, PATRICIA ANN BROWN

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QUESTIONS PRESENTED

I. WHETHER THIS COURT WILL GRANT A WRIT OF CERTIORARI ON PETITION OF A PARTY HAVING NO INTEREST IN THE OUTCOME OF THE APPEAL?

II. WHETHER THE VIRGINIA SUPREME COURT WAS CORRECT IN HOLDING THAT, UNDER THE FACTS OF THIS PARTICULAR CASE, THE PLAINTIFF BELOW COULD NOT ASSERT AN ACTION FOR NEGLIGENCE UNDER NONSTATUTORY GENERAL MARITIME LAW?

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BRIEF IN OPPOSITION OF RESPONDENT, PATRICIA ANN BROWN

QUESTIONS PRESENTED

I. WHETHER THIS COURT WILL GRANT A WRIT OF CERTIORARI ON PETITION OF A PARTY HAVING NO INTEREST IN THE OUTCOME OF THE APPEAL?

II. WHETHER THE VIRGINIA SUPREME COURT WAS CORRECT IN HOLDING THAT, UNDER THE FACTS OF THIS PARTICULAR CASE, THE

PLAINTIFF BELOW COULD NOT ASSERT AN ACTION FOR NEGLIGENCE UNDER NONSTATUTORY GENERAL MARITIME LAW?

STATEMENT OF THE CASE

Petitioner's Statement of the Case being incomplete, and therefore misleading, Respondent is required to summarize the proceedings below.

Edward Carol Brown ("decedent") was among several persons killed on March 17, 1975, as a result of the explosion of Tank Barge ATC 3060, owned by Allied Towing Corporation ("Allied"). "ATC 3060 was within the parameters of Allied's property [in Norfolk, Virginia] at the commencement of the work day on March 17, 1975." Complaint of Allied Towing Corporation, 409 F. Supp. 180 (E.D. Va. 1976) (App. K-8).

Subsequent attempts by Allied to limit or avoid its liability for injuries and deaths resulting from the explosion were rejected by the United States District Court for the Eastern District of Virginia, and on August 2, 1976, the various parties

asserting claims against Allied were permitted by the Federal Court to "repair to the forum of their choice." Complaint of Allied Towing Corporation, 416 F. Supp. 1207 (E.D. Va. 1976) (App. J-15).[1]

Kay J. Brown, the Administratrix of Edward Carol Brown's estate ("Administratrix") chose to repair to the Circuit Court of the City of Norfolk, Virginia, where she filed her Motion for Judgment on November 24, 1976. (App. F-1). In her Motion for Judgment, the Administratrix alleged all the elements of a Virginia wrongful death action, including a claim for damages for "the grief, mental suffering and emotional distress of

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[1] Since no portion of the record in the federal proceedings was ever made a part of the record in the State proceedings, the published opinions of the District Court and Court of Appeals are the only sources available to determine exactly what occurred in the federal proceedings.

[decedent's] dependent survivors; . . ." (App. F-5).

The only indication in the Motion for Judgment that the Administratrix was basing her claim on federal law was the conclusory statement that her claim was governed by the "General Maritime Law" of the United States. (App. F-5). Significantly, there was no indication whatsoever in the Motion for Judgment, nor at any time thereafter in the State proceedings, that the Administratrix's action was brought pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. ("LHWCA"). Rather, the possibility that the Administratrix could have asserted a claim under LHWCA was raised for the first time when the Administratrix filed a Petition for Rehearing in the Virginia Supreme Court after that Court had reversed the trial court's judgment.

The trial of the State court action commenced on June 18, 1980, but was never completed, since the Administratrix and Allied arrived at a settement prior to the issues being submitted to the jury. (Unfortunately, a transcript of this trial was never made a part of the record and is not available to the Court on this appeal.) Allied paid the agreed upon settlement proceeds into court and was thereupon released from any further liability to the Administratrix.

All subsequent proceedings in the State courts involved the resolution of disputes among the four claimants to the settlement fund. These claimants are: Kay J. Brown, widow of the decedent; Ronnie Edward Brown, decedent's natural son; Patricia Ann Brown, decedent's natural daughter; and Timothy Earl Hoggard, decedent's unadopted step-son.

The main dispute in the distribution proceedings was between Timothy Hoggard ("Hoggard") and Patricia Brown ("Patricia"). Hoggard contended that the distribution should be made in accordance with "general maritime law", which he claimed permitted him to participate in the recovery. Patricia argued, on the other hand, that the Administratrix had elected to proceed under State law and that only the beneficiaries designated in the Virginia Wrongful Death Act, Va. Code § 8.01-50, et seq. (App. M-1) could participate in the settlement fund, so that Hoggard was precluded from any recovery.[2]

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[2] Petitioner is incorrect in asserting that Respondent conceded in the trial court that non-statutory general maritime law applied in this case. See, Petition for Certiorari, page 17. This assertion by Petitioner is based solely on a statement made during oral argument, when Respondent's counsel stated that he was assuming arguendo that maritime law applied.

On October 31, 1980, the trial judge issued a written opinion stating his "firm conclution" that the State law of Virginia "shall no longer apply to cases involving the death of non-seamen persons upon the territorial waters of that State, that the non-statutory general maritime law controls instead. . . ." (App. D-1, D-14). The trial court then interpreted the "general maritime law" to permit recovery by decedent's step-son and awarded $31,340.00 to Hoggard, dividing the remaining settlement fund among Kay Brown, Ronnie Brown and Patricia in varying amounts.

Patricia appealed to the Virginia Supreme Court, asserting a number of different grounds for reversal of the trial court's distribution of the settlement funds, including an assertion that the trial court erred in holding that the

"non-statutory general maritime law" controlled.

The Virginia Supreme Court reversed the trial court, holding that, under the facts of this case, the Administratrix had no cause of action for negligence under non-statutory general maritime law; that the Administratrix's action, as brought in the State trial court, could only be prosecuted under the provisions of the Virginia Wrongful Death Act; and that, under the Virginia Act, decedent's step-son, Hoggard, was not a statutory beneficiary entitled to participate in the settlement fund. The Virginia Supreme Court thereby remanded the case to the trial court solely for the purpose of having the sum awarded to Hoggard redistributed among the other three claimants, Kay Brown, Ronnie Brown and Patricia.

The Administratrix has filed a Petition for Certiorari to this Court, asking that the judgment of the Virginia Supreme Court be reversed and that the judgment of the trial court be reinstated.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I.

THE PETITIONER-ADMINISTRATRIX HAS NO STANDING TO APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF VIRGINIA WHICH HAS NO EFFECT ON THE INTERESTS OF THE ADMINISTRATRIX.

The only party in the Court below who is adversely affected by the judgment of the Virginia Supreme Court is Timothy Hoggard, whose award of $31,340.00 has been taken away by virtue of the judgment of that Court. The other claimants to the settlement fund, Kay Brown, Ronnie Brown and Patricia Brown, have each benefited by the judgment of the Virginia Supreme Court, since the amount of their awards will be increased by virture of the redistribution of the amount previously awarded to Hoggard.

The judgment of the Virginia Supreme Court has no effect at all on the

interests of the estate of Edward Carol Brown, administered by Kay J. Brown as Administratrix. That is, the judgment of the Virginia Supreme Court only affects the manner in which the recovery obtained by the Administratrix is distributed among the potential beneficiaries thereof. Nevertheless, only the Administratrix has filed a Petition for Certiorari with this Court, seeking reversal of the judgment of the Virginia Supreme Court.[3]

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[3] It is clearly stated in the text of the Petition that the only Petitioner is Kay J. Brown, as Administratrix. See Petition for Certiorari, pages 1, 2 and 63. The caption of the Petition indicates that Kay Brown individually, Ronnie Brown and Timothy Hoggard are also "Petitioners", but it appears that this caption only reflects the alignment of the parties as they appeared in the Virginia Supreme Court. Obviously, Kay Brown, individually, and Ronnie Brown have no interest in overturning the judgment of the Virginia Supreme Court, which confers a substantial pecuniary benefit on them. It would be particularly inappropriate for Ronnie Brown to join in this Petition, since his interests are represented by a guardian ad litem and it would be a gross breach of the guardian's fiduciary duty to take a position adverse to the interests of his ward.

The law is settled that only a party who is "aggrieved" by a final judgment has standing to prosecute an appeal from such judgment. "A party aggrieved is one whose pecuniary interest is * * * affected by the decree; one whose right of property may be * * * divested by the decree." Ballard v. Maguire, 317 Mass. 130, 56 N.E.2d 891, 892 (1944), quoting from Wiggin v. Swett, 6 Metc. 194, 197, 39 Am. Dec. 716. Thus, the personal representative of an estate has no standing to appeal from an order which only directs the distribution of the assets of the estate among the beneficiaries. Ferrell v. Basnight, 257 N.C. 643, 127 S.E.2d 219 (1962) (executor had no standing to appeal order determining proper beneficiaries under a will); Ballard v. Maguire, supra, (trustees of testamentary trust had no standing to

appeal from decrees affecting only beneficiaries of trust); Shocket, Executor v. Silberman, 209 Va. 490, 165 S.E.2d 414 (1969) (executor had no standing to appeal from decree determining proper benefiaries under a will); see also, Security Finance Co. v. Langan, 281 Ky. 249, 135 S.W.2d 903 (1940) (corporate stakeholder, whose financial and legal interests were not affected by judgment, had no standing to appeal therefrom). It is particularly inappropriate for a personal representative of an estate, such as Petitioner here, to litigate the claims of one beneficiary against the other beneficiaries at the expense of the estate. Shocket, Executor v. Silberman, supra.

In Central Trust Co. v. Grant Locomotive Works, 135 U.S. 207 (1890), this Court dismissed appeals by parties whom

the Court determined had no interest in the outcome of the appeal. The appellants in question were purchasers at foreclosure of certain railroad lines, who appealed from an order directing how the foreclosure proceeds should be distributed among the creditors of the railroads. This Court held that because the orders complained of only affected the manner in which the sale proceeds would be distributed among the creditors and did not in any way affect the amounts to be paid by the purchaser-appellants, only the creditors had standing to appeal and the appeals by the purchasers would be dismissed. Id., at 222-225; see also, Stuart v. Gay, 127 U.S. 518 (1888); Farmers' Loan & Trust Co. v. Waterman, 106 U.S. 265 (1882).

Similarly, the Petitioner in this case is a mere stakeholder whose

interests are in no way affected by the judgment below. Timothy Hoggard is the only party "aggrieved" by the decision of the Supreme Court of Virginia. Nevertheless, Hoggard has not filed a Petition for Certiorari within the time mandated by 28 U.S.C. § 2101(c). His failure to do so precludes this Court from exercising jurisdiction over any petition subsequently filed by him. Rust Land and Lumber Co. v. Jackson, 250 U.S. 71 (1919); Matton Steamboat Co., Inc. v. Murphy, 319 U.S. 412 (1943). The Petition for Certiorari filed by the Administratrix cannot be amended to permit Hoggard to become a Petitioner thereon, Hartford Accident and Indemnity Co. v. Bunn, 285 U.S. 169, 52 S. Ct. 354, 76 L. Ed. 685 (1932), even upon a claim by Hoggard that he was not named as a Petitioner in the Administratrix's Petition because of a

clerical error. Cook & Sons Equipment, Inc. v. Killen, 277 F.2d 607 (9th Cir. 1960).[4]

The Petition for Certiorari must therefore be denied.

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[4] While Hoggard, as a respondent, could have filed a response in support of the Petition, such response was required to be filed within 20 days of the Petition. Rule 19.6, Rules of the Supreme Court of the United States. Cf., Director, OWCP v. Perini North River Assoc., 459 U.S. 297 (1983).

II.

THE VIRGINIA SUPREME COURT WAS CORRECT IN HOLDING THAT, UNDER THE FACTS OF THIS CASE, PETITIONER COULD NOT PROSECUTE A CAUSE OF ACTION FOR NEGLIGENCE UNDER NON-STATUTORY GENERAL MARITIME LAW.

Even if the Administratrix had standing to appeal from the judgment of the Virginia Supreme Court, the Petition for Certiorari should nevertheless be denied because the Virginia Supreme Court was correct in deciding that, under the facts of this case, the Administratrix could not prosecute a negligence action under non-statutory general maritime law.

Petitioner contends that the starting point for analysis of this case begins with Moragne v. States Marine Line, 398 U.S. 375 (1970). Actually, a proper analysis begins some 24 years prior to Moragne with this Court's opinion in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

In Sieracki, a stevedore employed by an independent contractor sued a shipowner, the contractor who built the ship and a subcontractor for injuries incurred while working aboard the ship. The trial court awarded the stevedore judgment against the contractor and subcontractor based on negligence, but refused to grant a judgment against the shipowner because it found that the shipowner was not negligent. On appeal, this Court held that the non-negligent shipowner could nevertheless be held liable because the ship was unseaworthy. Central to the Court's holding was the concept that stevedores and other harbor workers who perform on-board services historically performed by seamen, should be entitled to maintain an action for unseaworthiness, a remedy traditionally afforded to seamen.

The Court further held that the stevedore's unseaworthiness action was

not precluded by LHWCA, as it existed at that time, since the Act expressly permitted a longshoreman to bring an action against a third party who was not the employer of the longshoreman. Sieracki, 328 U.S. 85, 101.

Seventeen years after Sieracki, the Court decided Reed v. The Yaka, 373 U.S. 410 (1963), which also involved an injured longshoreman's unseaworthiness claim against a shipowner. However, in The Yaka, the shipowner was also the employer of the injured longshoreman. The employer contended that the longshoreman's unseaworthiness claim was precluded by § 905 of LHWCA, which provided that the compensation liability of an employer under the Act was in lieu of all other liability on his part. The Court, relying on Sieracki and on Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.,

350 U.S. 124 (1956), held that, despite the express language of § 905, the longshoreman could maintain a personal injury action against the employer-shipowner under the general maritime theory of unseaworthiness.

In Jackson v. Lykes Steamship Co., 386 U.S. 731 (1967), the Court extended the holding of The Yaka to a wrongful death case involving the death of a Seiracki "seaman", thereby permitting the widow of the decedent longshoreman to maintain a wrongful death action against the decedent's shipowner-employer on an unseaworthiness theory.

The Court will note that the facts in Jackson are indistinguishable from those of the present case. Thus, if Edward Carol Brown had been killed in 1967, his Administratrix could have brought a wrongful death action against Allied

based on a general maritime unseaworthiness theory, so long as the Administratrix was able to prove that the decedent was a Sieracki "seaman".

Finally, in 1970, this Court decided Moragne. While Moragne is most frequently cited for its holding that an action for unseaworthiness can be brought under general maritime law, irrespective of any State law to the contrary, it is perhaps just as significant that, in Moragne, the Court abandoned any requirement that a decedent be a Sieracki "seaman" or any other type of seaman, in order for his estate to bring a wrongful death action based on unseaworthiness.

In 1972, Congress substantially amended § 905 of LHWCA and provided, in conjunction with § 933 of the Act, a statutory remedy for injury or death caused by the negligence of a "vessel." Congress

further provided that this negligence remedy would be in lieu of any liability of the vessel for unseaworthiness and was "exclusive of all other remedies against the vessel." LHWCA § 905(b). Thus, Congress implicitly overruled the Sieracki-Ryan Stevedoring line of cases (see, Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 164-166 (1981)), and also Moragne to the extent that Moragne permitted the estate of a person covered by LHWCA to bring a wrongful death action based on unseaworthiness.

Furthermore, Congress intended that the statutory negligence action provided in § 905(b) of the Act would proceed in accordance with land-based tort principles, rather than general maritime law principles. Scindia, supra, 165-166, fn. 13; Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030 (5th Cir. 1977)

cert. denied, 435 U.S. 924 (1978); Rich v. United States Lines, Inc., 596 F.2d 541 (3rd Cir. 1979). No longer would a person covered by LHWCA be permitted to bring an action against a shipowner based on "any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called. . . ." Senate Report No. 92-1125, p. 10 (1972). See, Arnold v. Excalibur Shipping Co., 470 F. Supp. 672 (E.D. Va. 1979) (longshoreman's claims for "breach of warranty" and "strict liability" dismissed).

It is thus clear in the present case that if the Administratrix was to avail herself of a federal law remedy for the death of decedent, she was required to proceed with a LHWCA § 905(b) negligence action and could not proceed under any "special maritime theory . . . under

whatever judicial nomenclature it [might] be called."[5]

This leaves the question of whether the Administratrix could elect to pursue her state law remedy under the Virginia Wrongful Death Act in lieu of proceeding under LHWCA. This question is answered by Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715 (1980), in which this Court held that coverage by LHWCA was not exclusive

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[5] The Court should not be misled by any contention in this appeal that the Administratrix was prosecuting a LHWCA § 905(b) action in the State court. The Administratrix's Motion for Judgment contains no indication that she was pursuing a § 905(b) action and Petitioner insisted throughout the proceedings below that the action was a "Moragne negligence" action brought under the general maritime law. It was only after the Virginia Supreme Court had ruled that the Administratrix could not prosecute a negligence action under general maritime law that Petitioner, in her Petition for Rehearing, first raised the possibility that she could have brought an action under LHWCA. Nevertheless, even on this appeal, Petitioner continues to insist that hers was an action under Moragne.

of State law remedies. Rather, persons covered by LHWCA could avail themselves of State law remedies, which the Court acknowledged are, in some instances, superior to the federal remedial scheme. Justice Brennan, speaking for a unanimous court, noted that to hold otherwise would compel an injured worker to make a "jurisdictional guess" before filing a claim, the price of error being unnecessary expense and possible foreclosure of obtaining any recovery by the statute of limitations. Id., at 718. See also, Davis v. Department of Labor, 317 U.S. 249, 254 (1942); and see, American Original Foods, Inc. v. Ford, 221 Va. 557, 272 S.E.2d 187 (1980), in accord with Sun Ship.

Although Sun Ship involved a claim for compensation benefits rather than a claim for tort damages, the rationale of Sun Ship applies equally to damages cases.

Indeed, in tort damages cases, where potential recoveries are usually much higher than in compensation benefits cases, the penalty for making an erroneous "jurisdictional guess" can be even more severe.

In the present case, the Administratrix apparently perceived that there were certain advantages to proceeding under the Virginia Wrongful Death Act as opposed to LHWCA (e.g., recovery for grief and mental anguish is available under the Virginia Act. Va. Code § 8.01-53(1) (App. M-3). Cf., Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 585-586 (1974) (No recovery for mental anguish or grief)). Nevertheless, a recovery predicated on State law having been obtained, Timothy Hoggard was able to persuade the trial court that distribution of the recovery should be made under "general maritime law" rather than State law.

The Virginia Supreme Court refused to allow Hoggard to "have his cake and eat it too" and held that, in the context of this case, no general maritime law negligence action was available to the Administratrix; that having claimed the benefits of the Virginia Wrongful Death Act for purposes of making a recovery, the Administratrix and those claiming under her could not then avoid the strictures of that Act for purposes of distributing the recovery; and that the Virginia Wrongful Death Act did not permit Hoggard to participate in the recovery.

In her Petition for Certiorari, the Administratrix centers her attack on the Virginia Supreme Court's holding that no general maritime law negligence action was available to the Administratrix. Nevertheless, there is ample authority to support the holding of the Virginia

Supreme Court. In Ford v. Wooten, 681 F.2d 712 (11th Cir. 1982), cert. denied ____ U.S. ____, 103 S. Ct. 1187 (1983), the question posed was "whether Moragne should be extended to permit recovery under general maritime law for wrongful death caused by negligence." Id., 716. The Court first noted that it had been able to find only one case wherein such a negligence claim had been permitted.[6] The Court noted further that the plaintiff's claim fell within the coverage of the Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 761, et seq., and then went on to hold that Moragne could not be extended to permit a general maritime law wrongful death action for negligence.

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[6] Nelson v. United States, 639 F.2d 469 (9th Cir. 1980) ("need for uniformity" required extension of Moragne to cover claims based on negligence. However, the negligence claim was dismissed on the merits.)

> "At least where statutory remedies exist, we deem consistency with the federal remedial schemes to be more important than the somewhat limited loss of uniformity. Therefore, we hold that where a cause of action exists for wrongful death under DOHSA, no additional action exists under general maritime law for wrongful death caused by negligence; the Moragne remedy applies only to unseaworthiness."

681 F.2d at 716-717. See also, Ivy v. Security Barge Lines, Inc., 606 F.2d 524 (5th Cir. 1979) (en banc), cert. denied, 446 U.S. 956 (1980).

The holding of Ford v. Wooten is equally applicable here. Petitioner's sole federal remedy is furnished by LHWCA and she cannot avail herself of a negligence action under general maritime law.

Furthermore, this Court has consistently indicated that its holding in Moragne was meant to apply only to an action for unseaworthiness. For instance, in American Export Lines, Inc. v. Alvez,

446 U.S. 274 (1980), involving a claim arising before the 1972 amendments to LHWCA, Justice Brennan, writing for the majority, stated: "Moragne . . . held that an action for wrongful death based upon unseaworthiness is maintainable under general federal maritime law." Id., 280. See also, Sea-Land Services, Inc. v. Gaudet, supra, at 573 (Powell, dissenting). No decision of this Court has ever indicated that Moragne sanctioned a general maritime law action for wrongful death caused by negligence.[7]

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[7] In Foremost Insurance Co. v. Richardson, 457 U.S. 668, reh. denied 74 L. Ed. 2d 160 (1982), an allegation of negligence was made in the trial court. Nevertheless, the issue of whether a wrongful death action based on negligence was permitted under general maritime law was not raised in this Court and the Court's opinion does not even mention Moragne. Furthermore, the death in Foremost arose as a result of a collision between two pleasure boats and did not involve persons covered by LHWCA.

It is thus abundantly clear that Petitioner's reliance on Moragne is misplaced. Since the decedent in this case was a person covered by LHWCA, Petitioner's sole federal remedy was an action under that Act. The Virginia Supreme Court was quite correct in holding that Petitioner could not avail herself of a negligence action under general maritime law. Cases cited by Petitioner for the contrary proposition either involved claims arising prior to the effective date of the 1972 amendments to LHWCA or involved claims not within the coverage of LHWCA (e.g., Glenview Park District v. Melhus, 540 F.2d 1321 (7th Cir. 1976) cert. denied 429 U.S. 1094 (1977) (capsize of canoe on recreational outing); Scholl v. Town of Babylon, 466 N.Y.S.2d 976 (App. Div. 1983) (collision between pleasure boat and swimmer)).

Finally, some mention must be made of Petitioner's res judicata/collateral estoppel arguments. When the United States District Judge's statement, relied upon by Petitioner for this argument, is read in context, it is plain that the Court only intended to indicate that Allied was bound by the Court's determination of Allied's negligence and the Court's rejection of Allied's attempts to limit or avoid liability. See Complaint of Allied Towing Corporation, 416 F. Supp. 1207 (E.D. Va. 1976) (Apps. J-13, 14). Furthermore, Respondent, Patricia Brown, was not a party to the federal proceedings and would not be bound even had the District Judge intended that parties other than Allied were somehow to be bound.

CONCLUSION

The Petition for Certiorari should be denied because:

1. The Petition indicates that the Petitioner is the Administratrix of the decedent's estate, who, under settled law, has no standing to appeal the judgment of the Court below. Elsewhere, it is indicated that the Administratrix and all of the beneficiaries of the estate (except Patricia Brown), are the Petitioners, even though the interests of Kay Brown and Ronnie Brown are in irreconcilable conflict with those of Timothy Hoggard. With this confused state of affairs, the Court cannot expect the issues which the Petitioner attempts to raise to be adequately addressed if an appeal is granted.

2. The issues raised in the Petition are not novel. Opinions of this Court

and numerous opinions of the lower courts have already made it clear that, under the 1972 amendments to LHWCA, claims arising from the injury or death of a person covered by the Act must be prosecuted within the confines of the Act or pursuant to State law under the concurrent jurisdiction principles announced in Sun Ship, Inc. v. Pennsylvania, supra.

Contrary to Petitioner's contention, Moragne was never intended to create a general maritime law wrongful death action for negligence, and even if it did, such an action would not be available to Petitioner here. To permit such an action by a party in Petitioner's position would be to allow circumvention of Congress' express direction that persons covered by LHWCA would no longer be permitted to avail themselves of "special maritime theories of liability."

3. The dire consequences of the Virginia Supreme Court's decision predicted by Petitioner are imaginary. No wrongful death claimant has been deprived by that decision of any right enjoyed prior to the decision. The estates of persons covered by LHWCA (such as here) can continue to pursue their statutory negligence actions under either LHWCA or the Virginia Wrongful Death Act. The estates of persons covered by DOSHA and the Jones Act can continue to pursue their claims under the provisions of those Acts. The estates of persons killed in the territorial waters of Virginia who are not covered by either LHWCA or the Jones Act can continue to pursue negligence actions under the Virginia Wrongful Death Act and actions for unseaworthiness pursuant to Moragne.

To reinstate the State trial judge's opinion that federal maritime law applies to all deaths occurring on Virginia's waters, to the exclusion of State law, as prayed by Petitioner, would be to resurrect the "jurisdictional dilemma" which results when claimants must proceed under one of two mutually exclusive remedial schemes. Sun Ship, Inc. v. Pennsylvania, supra, at 720. Under the rule contended for by Petitioner, a wrongful death claimant who commences a federal maritime action on the assumption that the death occurred on navigable waters may subsequently find himself precluded from any remedy if his "jurisdictional guess" was wrong. Id., at 718.

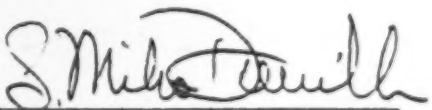
4. The record in this case is not adequate to permit a proper analysis of the issues raised in the Petition for Certiorari. None of the pleadings,

transcripts of testimony or documentary evidence in the federal proceedings is included in the record. Likewise, there are no transcripts of the proceedings in the State trial court, except for post-trial hearings. Thus, many of the assertions made by Petitioner in the Petition for Certiorari cannot be supported by anything appearing in the record below.

The Petition for Certiorari should therefore be denied.

Respectfully submitted,

PATRICIA ANN BROWN

By 
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CERTIFICATE OF SERVICE

I hereby certify that on or before the 16th day of May, 1984, three copies of the foregoing Brief in Opposition of Respondent Patricia Ann Brown were mailed, postage prepaid, to Alan P. Owens, Smith & Owens, 250 Monticello Arcade, P. O. Box 3646 Norfolk, Virginia 23514, counsel for Kay J. Brown, Administratrix, Kay J. Brown, Individually, and Timothy Earl Hoggard and to Wiley G. Gary, Esquire, 223 Monticello Arcade, Norfolk, Virginia 23515, Guardian Ad Litem for Ronnie Edward Brown.

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